82-984

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON
V.
FEDERAL TRADE COMMISSION

APPENDICES C, D, E, F, G, H

APPENDIX C: PETITION FOR RECONSIDERATION FILED WITH THE FEDERAL TRADE COMMISSION, JUNE 6, 1980.

APPENDIX D: OPINION OF THE FEDERAL TRADE COMMISSION AMENDING THE ORDER OF APRIL 30, 1980 (96 FTC 126-133).

APPENDIX E: ALJ'S OPINION AND ORDER OF FEBRUARY 26, 1979 (95 FTC 553-721).

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APPENDIX G: 5TH CIRCUIT ORDERS DENYING REHEARING AND REHEARING EN BANC SEPTEMBER 13, 1982 (688 F2d 840).

APPENDIX H: TESTIMONY OF JAMES S. MILLER FEBRUARY 16, 1978.

PETITION

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PETITION FOR RECONSIDERATION FILED

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FEDERAL TRADE COMMISSION

JUNE 6, 1980

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In The Matter of HERBERT R. GIBSON, SR., et al	)))	DOCKET NO. 9016

PETITION OF H. R. GIBSON, SR. AND BELVA GIBSON FOR RECONSIDERATION, AND FOR STAY OF FINAL DECISION AND ORDER

TO: THE FEDERAL TRADE COMMISSION

Now come the Respondents H. R. Gibson, Sr. and his wife, Belva Gibson, and move that the Commission reconsider its Decision and Final Order of April 30, 1980, granting a stay of the effective date of the Order and Decision until 60 days after completion of service on these Respondents of the Order disposing of this Motion. These Respondents would show that such Decision and Final Order should be reconsidered for the following reasons:

1. TO CORRECTLY REFLECT THE COMMISSION DECISION, SECTION II.2 OF THE ORDER SHOULD BE ALTERED TO CONFORM TO II.1 ('AS A BUYER OR ACTING FOR OR IN BEHALF OF OR SUBJECT TO THE DIRECT OR INDIRECT CONTROL OF A BUYER").

The Decision of the Commission makes it clear that the restraints on the Respondents H. R. Gibson, Sr. and Belva Gibson under Count III of the Complaint have to do with receiving commissions when these Respondents are acting "as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer". In response to the argument of these Respondents on the Appeal of the Initial Decision, the Commission phrased Section II.1 of the order accordingly. However, Section II.2 has not been so phrased, possibly from oversight.

To correctly reflect the Commission's intentions as expressed in the Final Decision, Section II.2 of the Final Order should be changed to read as follows:

> "2. Assuming control of or influencing any seller or seller's broker to induce such seller or seller's broker to pay to respondent[s], as a buyer or acting for or in behalf of or subject to the direct or

indirect control of a buyer, anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including Gibson Discount Center."

It is apparent that the Commission intended for the phrase "as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer" to govern both the restraints in II.1 and in II.2. As an alternative form of clarifying this in the Order, the phraseology in paragraph II.1 could be moved to the introductory paragraph so that Section II. would read as follows:

"II.

IT IS FURTHER ORDERED that Herbert R. Gibson, Sr., individually and doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, Gibson Products Co., Inc., Gibson's Inc., Gibson's Discount Centers, Inc.,

their successors and assigns, officers, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the purchase of merchandise as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer,* in "commerce" as commerce is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Receiving or accepting, directly or indirectly, from any seller or seller's broker anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereofupon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center."

2. Assuming control of or influencing any seller or seller's broker to induce such seller or seller's broker to pay to respondent[s] anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including Gibson Discount Center."

The "buyer" phrase was not in the corresponding section of the Order accompanying the Initial Decision (Attachment A). One of the points in the Appeal was that this section should be limited to where H. R. Gibson, Sr. (or his wife Belva) was acting as a buyer. The Final Decision of the Commission declined to limit it to that extent, but did limit the Count III part of the Order as to these Respondents, to situations where H. R. Gibson, Sr. acted as buyer or on behalf of or subject to the direct or indirect control of a buyer (Final Decision pp. 28-29). Obviously it was intended that this same qualification apply to II.2.

It is requested that the Commission add the phrase "as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer" either to II.2, or move the phrase from II.1 to the introductory paragraph of Section II of the Order.

Respondents do not waive their position that the order should be limited to situations in which H. R. Gibson, Sr., is a buyer. The case was tried only upon the theory that H. R. Gibson, Sr. was a buyer.

2. GROLIER DECISION REQUIRES DISQUALIFICATION OF ALJ, FORMER ATTORNEY-ADVISOR TO COMMISSIONER MACINTYRE IF PRIVY TO "EX PARTE" INFORMATION OR IF HE DEVELOPED A "WILL TO WIN".

This case was submitted on oral argument July 11, 1979. At that time the law was that merely because the Administrative Law Judge was formerly an Attorney-Advisor to a Commissioner, had access to ex parte information, and may have advised the Commissioner on prosecutorial and investigative matters before the Commission regarding the same Respondents on similar charges, it is not relevant to disqualification. See Grolier Inc. Docket No. 8879, Order of February 10, 1976, denying Motion to Disqualify ALJ. Also, The Kroger Co., Docket No. 9102.

Order Denying Motion to Disqualify ALJ, February 26, 1979.

Since the submission of this case on July 11, 1979, the Ninth Circuit has handed down a decision holding that the Commission is in error in this approach. Grolier Inc. and America's People Press Inc. v. FTC (9th Cir. 1980) 1980-1 TC §63, 153. This case holds that where the ALJ Theodor P. von Brand had served as Attorney-Advisor to former Commissioner Everette MacIntyre from 1963 through January 1971, during which period Grolier was intermittently investigated and charged by the FTC, that if he had access to ex parte information, or if he had developed by prior involvement with the case, or matters of similar nature involving the same respondents, a "will to win", then Theodor P. von Brand was precluded from serving as an ALJ over Grolier's adjudicative proceeding by the provisions of the Administrative Procedure

Act §554(d). 5 U.S.C.554(d)(1) expressly prohibits an ALJ from acquiring ex parte information.

The Ninth Circuit in Grolier states that if the ALJ was sufficiently involved with the case to be apprised of ex parte information, that his disqualification is mandatory. This tainting applies to a "factually related case" as well as the case itself.

In Docket No. 9016 Administrative Law Judge Theodor P. von Brand presided over the pre-trial and trial of this matter had previously served with the Federal Trade Commission as Attorney-Advisor to Everette MacIntyre from 1963 through January, 1971 (Grolier). During that period Respondent H. R. Gibson, Sr. was intermittently investigated by the Federal Trade Commission.

On January 17, 1967, FTC investigator, Jess C. Radnor, contacted Respondent H. R. Gibson, Sr. and required the sub-

mission of the names and addresses of all Gibson stores, the ownership of all stores, the ownership of all stores owned by relatives of H. R. Gibson, Sr. by blood or marriage, and the selling prices for gallons and one-half gallon milk in connection with File No. 671-0062 (Attachment B).

At the time this investigation of H. R. Gibson, Sr. was being conducted, Everette MacIntyre was a member of the Commission, and the Administrative Law Judge Theodor P. von Brand was his Attorney-Advisor.

A subpoena duces tecum was issued on August 29, 1967, (Attachment C), by Commissioner Reilly to the Respondent H. R. Gibson, Sr. in care of Gibson Products Company, Seagoville, Texas, in connection with non-public investigation File NO. 671-0229, pursuant to Commission Resolution dated August 29, 1967. That

Resolution indicates that Everette MacIntyre was a Commissioner voting for the Resolution (Attachment D).

The Resolution of August 29, 1967, was entitled "Resolution Directing an Investigation of the Practices of Gibson Products Company in Connection with the Purchasing, Pricing, Distribution and Sale of Sundry Merchandise Sold Through Retail Outlets."

Said Resolution recites that the Commission has reason to believe that Gibson Products Company "may have been and may now be inducing, coercing, intimidating or requiring its suppliers to sell merchandise to it on terms which are discriminatory or injurious to competition; may have been and may now be conspiring to boycott...," and that such practices may constitute unfair methods of competition under Section 5 of the FTC Act and may be in violation of Robinson-Patman

2(f).

At the time this Resolution was passed and investigation conducted, Theodor P. von Brand was Attorney-Advisor to Commissioner MacIntyre.

By Resolution dated September 17, 1969 (Attachment E), the Federal Trade Commission approved an investigation "into the acts and practices of Gibson Products Company and H. R. Gibson, Sr. d/b/a Gibson Products Company, Gibson Products Co. and Gibson Discount Centers, their franchisees and licensees, as well as certain milk suppliers. This was designated File NO. 691-0058. At the time this Resolution was passed, Everette MacIntyre Commissioner and his name is listed at the top of the Resolution. At that time Theodor P. von Brand was Attorney-Advisor for MacIntyre.

Under this Resolution and under this File NO. 691-0058, the Federal Trade Commission continuously investigated H. R.

Gibson, SR., the Respondent herein, from 1969 until the date of the issuance of the Compalint in Docket No. 9016, February 25, 1975. Much of this investigation was conducted by Andre Trawick who later became Chief Complaint Counsel in this matter. At that time he was subject to the direct supervision of Everette MacIntyre, a commissioner, and Everette MacIntyre was advised by Theodor P. von Brand, (the Administrative Law Judge during the trial of Docket No. 9016).

A Commission subpoena was issued to the Respondent H. R. Gibson, Sr., on October 2, 1970, in connection with the Resolution in File 691-0058 dated September 17, 1969. Both at the time the Resolution was issued and when the subpoena was issued to this Respondent, Everette MacIntyre was a Commissioner for the Federal Trade Commission and Theodore P. von Brand was Attorney-Advisor to

Commissioner MacIntyre. (Attachment F).

Respondent H. R. Gibson, Sr. filed a Motion To Quash And/Or Limit the subpoena referred to above with the Commission on October 8, 1970, and the Commission responded with a six-page Opinion November 17, 1970, holding that the Motion to limit or quash the subpoena was without merit. An Order denying the motion was issued by the Commission the same date. At this time Everette MacIntyre was a member of the Commission, and his name appears on the Order and on the Opinion. At the time this Opinion was written, Theodor P. von Brand was Attorney-Advisor to Everett MacIntyre. Whether Theodor P. von Brand had a part in writing this Opinion is not known to this Respondent. However, the Opinion is quite sharp in its denial of the Motion and critical of the Respondent H. R. Gibson, Sr. (Attachment G).

There can be no doubt that in the approval of this Opinion and Order of November 17, 1970, that the Attorney Advisor for Commissioner MacIntyre (Theodore P. von Brand) would surely have developed the "will to win" specified by the Ninth Circuit in Grolier as precluding von Brand's participation in the adjudicative function. Plainly at the time this Opinion and Order was handed down by the Commission, the Complaint Counsel, Andre Trawick, then the Chief Investigating Attorney against Respondent H. R. Gibson, Sr., was under the direct supervision of the Commission, and in effect of Theodor P. von Brand, Attorney-Advisor to Commissioner MacIntyre.

On December 1, 1970, the return date of the subpoena duces tecum directed to the Respondent H. R. Gibson, Sr., Rafe Chloe of the FTC presided. Bardwell D. Odum, the undersigned attorney, appeared before

Chloe on behalf of Respondent H. R. Gibson, Sr., and respectfully declined compliance. At that time, on the record, FTC employee Rafe Chloe proceeded to "explain" Sections 9 and 10 of the FTC Act to the undersigned attorney. When he could not get the undersigned attorney to reverse his field and produce the Respondent H. R. Gibson, Sr., Chloe then proceeded to read into the record his determination to report the matter to the Commission and recommend that Bardwell D. Odum, attorney for H. R. Gibson, Sr., never again be permitted to practice before the FTC, because of what Chloe termed the attorney's causing the FTC to spend money unnecessarily. (Attachment II).

On December 1, 1970, and at the time Mr. Chloe apparently reported this matter to the Commission, Everette MacIntyre was a member of the Commission, and Theodor P. von Brand was Attorney-Advisor to

MacIntyre. Andre Trawick represented the Commission at the "hearing" presided over by Chloe, and spearheaded the investigation and the subsequent proceedings to enforce the subpoena. Trawick later became lead Complaint Counsel in Docket No. 9016.

During these proceedings Theodor P. von Brand as legal advisor to Commissioner MacIntyre must surely have had access to ex parte information and perfected the "will to win" syndrome.

As of December 1, 1970, Theodor P. von Brand was unknown to these Respondents or to undersigned attorney Bardwell D. Odum. At the time the Complaint was filed February 25, 1975, neither of these Respondents nor attorney Bardwell D. Odum was aware that Theodor P. von Brand was Attorney Advisor to Everett MacIntyre during the confrontation of December 1, 1970.

On February 23, 1977, ALJ Theodor P. von Brand at a Pre-Trial hearing advised attorney Bardwell D. Odum that he had been legal advisor to Commissioner MacIntyre from 1963 to 1970. At this time he stated that it was his understanding that none of the Respondents would raise an objection to his continuing in this case on the ground of such employment. He elicited a corresponding assent to this proposition from attorney Odum, representing Respondents H. R. Gibson, Sr. and Belva Gibson. He did not disclose what action he may have participated in involving these Respondents. At that time the law was that such employment would not disqualify an ALJ. That was changed with Grolier Inc. v. FTC (9th C. 1980) 1980 - 1 T.C.§63153.

While the full details of the access of von Brand to ex parte information, and his full participation in prosecutive matters involving this case, and factually

related cases concerning these Respondents, is not available to these Respondents, sufficient information has been elucidated to indicate the very strong probability and presumption that Theodor P. von Brand during his term as Attorney-Advisor to Commissioner MacIntyre not only was privy to much ex parte information but also participated at the side of Commissioner MacIntyre in administrative and formal decisions of the Commission which directed the efforts of the Commission against H. R. Gibson, Sr. eventually resulting in the Complaint in Docket No. 9016. In practical effect, Theodor P. von Brand was supervising (through his insider post as aide to Commissioner MacIntyre) the investigative efforts of Andre Trawick who at that time was the attorney in charge of the investigation of H. R. Gibson, Sr. When Trawick later advanced to Chief

Prosecutor, and von Brand to Judge (over the same matter), there is no doubt that due process was not afforded theseRespondents, i.e., a fair and impartial trial.

ALJ Theodor P. von Brand, at the time the Resolutions were issued, and during the investigation of these Respondents pursuant to said Resolutions, was Attorney-Advisor to Commissioner Everette MacIntyre and quite apparently had access to ex parte information.

Presumably Judge von Brand advised Commissioner MacIntyre and participated in non-public meetings where prosecutorial decisions were made.

Either or both of these situations is sufficient to disqualify Theodor P. von Brand under 5 U.S.C. 554(d). Under this situation, these Respondents could not, and did not, have the due process guaranteed by the Fifth Amendment to the

Constitution of the United States, the Administrative Procedure Act, and the Rules of the Federal Trade Commission. They were, and are, entitled to have the facts judged by a fair and impartial judiciary. This they have not had.

Under the provisions of the 9th Circuit decision in Grolier, supra, access to ex parte information (being prohibited by the Administrative Procedure Act, §552) absolutely disqualifies the ALJ from sitting in the adjudicative matter against this same Respondent.

In addition, it appears certain that access to ex parte information by Theodor P. von Brand and participation in deliberations and non-public meetings where prosecutorial decisions were made by the Commission would have caused him to have developed the "will to win" in the Commission's case against this Respondent.

In view of the 1980 Ninth Circuit

Grolier decision (subsequent to the time this case was argued before the Commission), it is requested that the Commission reconsider this case and dismiss same as to these Respondents, since there has been no trial by a fair and impartial judiciary, as required by the Constitution of the United States, the Administrative Procedure Act, and the Rules of the Federal Trade Commission.

Alternatively, the matter should be remanded to allow these Respondents sufficient discovery by taking a deposition of Theodor P. von Brand and obtaining the records involving Theodore P. von Brand's association with this case and related cases involving these Respondents while Theodor P. von Brand served as Attorney-Advisor for Everette MacIntyre.

Alternatively, this case should be reconsidered, reversed, and remanded for a new trial under an administrative law judge

who does not suffer under the handicaps outlined above for Theodor P. von Brand.

3. ANTI-DEFICIENCY ACT RENDERS ACTIONS OF COMMISSION TAKEN DURING DEFICIENCY FUNDING PERIODS IN ADJUDICATION OF THIS MATTER, ILLEGAL.

Since this case was submitted to the Commission on July 11, 1980, the Attorney General of the United States, the Honorable Benjamin Civiletti, in a letter addressed to the President of the United States, dated April 25, 1980, advised that he interprets the Anti-Deficiency Act 31 U.S.C. 665(a) as prohibiting the expenditure of any money by an agency during a period when it is without appropriation authorization by Congress. (Attachment I). Such expenditure according to the Attorney General would be illegal, not authorized by Congress, and would include the payment of salaries for employees during said period of lapsed appropriation, with the possible exception

of paying salaries of employees to close the agency down.

This opinion of the Attorney General of the United States applies to the Federal Trade Commission and its employees. Therefore, the Federal Trade Commission is violating the law by paying its employees to perform any act during a period of lapsed appropriation. Since the payment of salaries to employees who may be attempting to perform official functions is illegal, the action of the employees, and the action of the Commission taken on such dates is void.

In addition to preventing the expenditure of monies, and the contracting for expenditure of monies by an Administrative Agency during a period of lapsed appropriation, 31 U.S.C. 665(b) also prohibits the Commission from accepting voluntary service. Therefore, if the FTC does not have the authority to make

expenditures for salaries of employees during a period of lapsed appropriation, and it does not have authority to exist, and it cannot accept voluntary services from its "employees", then any action taken by an FTC "employee" during a time of lapsed appropriation is illegal, and cannot constitute a lawful act of a governmental agency.

From 1973 through March, 1980, the Federal Trade Commission, during investigation and prosecution of these Respondents, has suffered the following periods of lapsed appropriation:

From 1973 through March, 1980, the Federal Trade Commission, during investigation and prosecution of these Respondents, has suffered the following periods of lapsed appropriation:

October 1 - 3, 1973
October 12 - 15, 1973
October 1 - 16, 1974
December 21 - 30, 1974

July 1 - Sept. 30, 1976
October 1 - 9, 1978
October 1 - 11, 1979
March 12 - 27, 1980
(Attachment J)

While the date on which actions were taken by the Commission and its employees is not totally within the possession of these Respondents, undoubtedly many actions have been taken during a period when the Federal Trade Commission had no authority to act in this matter or in any other matter. For example, during the adjudication of this matter, the Federal Trade Commission took the following actions during a lapsed appropriation period between July 1, 1976 and September 30, 1976:

> July 1, 1976 - ALJ Theodor P. von Brand signed Order authorizing the taking of depositions.
>
> July 2, 1976 - The Secretary of the FTC filed the above-described Order.

July 6, 1976 - The ALJ signed an Order granting Complaint Counsel's Motion to Amend Commission Witness & Exhibits Lists and the Secretary filed such Order.

July 6, 1976 - ALJ Theodor P. von Brand signed and filed with the Secretary of the Commission an Order granting in part and denying in part Motion For Protective Order Pending Disposal of Appeal to the FIfth Circuit.

July 7, 1976 - Complaint Counsel signed Answer to Motion of Respondents Herbert R. Gibson, Sr., and Belva Gibson to Withdraw From Adjudication.

July 7, 1976 - ALJ Theodor P. von Brand signed and filed with the Secretary of the Commission an Order granting in part Motion for Protective Order and Denying Motion to Amend Protective Order of October 31, 1975.

July 9, 1976 - Secretary of the Commission filed Answer to Motion of Respondents Herbert R. Gibson, Sr., and Belva Gibson to Withdraw From Adjudication.

July 15, 1976 - Complaint Counsel signed Proposals for Authenticating Underlying Documents for Commission Tabulations.

July 19, 1976 - Secretary filed above-described Proposals.

July 22, 1976 - ALJ Theodor P. von Brand signed and filed with the Secretary an Order Rescheduling Depositions.

July 29, 1976 - ALJ signed and filed with Secretary Certification of Motion to Withdraw from Adjudication of Respondents Herbert R. Gibson, Sr., and Belva Gibson.

August 19, 1976 - Complaint Counsel filed a Motion Requesting Certification of a document to be considered by the Commission in connection with the Motion To Withdraw.

August 23, 1976 - Secretary of Commission filed above-described document.

August 23, 1976 - ALJ Theodor P. von Brand signed and filed Certification of document clarifying Complaint Counsel's position with respect to settlement proposals.

September 8, 1976 - Complaint Counsel signed Request for Extension of Time to Answer Motions.

September 13, 1976 - Secretary filed above described document.

September 13, 1976 - ALJ filed Order Extending Time.

September 14, 1976 - Secretary of Commission filed above-described document.

September 21, 1976 - Commission filed Order signed by Charles A. Tobin, Secretary, on the same date Denying Motion to Withdraw Matter from Adjudication.

September 30, 1976 - Complaint Counsel filed Answer to Memorandum of Herbert R. Gibson, Sr., and Belva Gibson recommending withdrawal from adjudication.

Undoubtedly with the proper discovery, it will be ascertained that numerous actions affecting the investigation and prosecution of this matter by the Federal Trade Commission were taken at a time when the Commission was without authority to act and thus these actions are illegal.

It is requested that on reconsideration this matter be remanded for the purpose of allowing discovery by respondents on the Commission to determine just what acts of the Commission were performed on the dates when the Commission had no authority to act.

CONCLUSION

It is requested that the Commission grant a stay of the effective date of the Final Decision and Order until 60 days after completion of service on these Respondents of the Order disposing of this Motion For Reconsideration, so that the Motion itself can be adequately considered and ruled upon.

It is requested that the Commission make available to these Respondents an opportunity for oral argument prior to the Commission ruling on said Motion.

It is requested that the Commission amend the wording of the Final Order to include the phrase "as a buyer or acting

for or in behalf of, or subject to the direct or indirect control of a buyer" in paragraph 2 of Section II of the Order, or that such language be shifted from paragraph 1 of Section II to the introductory paragraph of Section II, so that it will apply to sub-paragraphs 1 and 2.

Alternatively it is requested that the Commission withdraw the Final Decision and Order and substitute therefor a decision dismissing these Respondents as to all counts in view of the fact that due process has not been satisfied because these Respondents have not been afforded the opportunity to have their case heard by an impartial, independent, and unbiased fact-finder, and because 5 U.S.C. 552(d) prohibits ALJ Theodor P. von Brand from acting in an adjudicatory role where he has received ex parte information regarding these Respondents in factually related

matters and/or has been involved with prosecution and/or investigation of these Respondents to the extent that he has formed within his mind the "desire to win" the case for Federal Trade Commission.

Alternatively these Respondents request the Commission to withdraw the Final Decision and Order and substitute therefor an order remanding this matter for further proceedings to another administrative law judge for the purpose of determining the extent to which Theodo P. von Brand was privy to ex parte information and the extent to which he participated in investigatory and prosecutorial matters of this case and the related investigations of these Respondents predating the Complaint in Docket 9016, while Theodor P. von Brand was Attorney-Advisor for Commissioner Everette MacIntyre.

Alternatively Respondents H. R. Gibson, Sr., and Belva Gibson request the

Commission to withdraw the Final Decision and Order and remand this case to another administrative law judge for the purpose of a new trial on the entire matter.

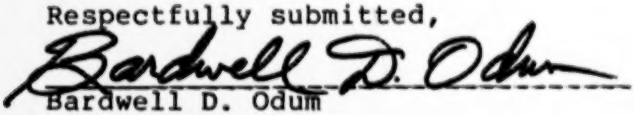
Alternatively these Respondents request the Commission to withdraw the Final Decision and Order and to substitute therefor a new order dismissing the case as to these Respondents because actions of the Commission taken during "lapsed appropriation" periods are illegal actions not authorized by the Congress of the United States. Since the investigation of these Respondents and the trial of this matter cover several periods of "lapsed appropriation" the entire matter is rendered an illegal proceeding by the void actions taken during such pericds by the Commission and their employees.

Alternatively these Respondents request that the Commission withdraw the Final Decision and Order and substitute

therefor an order remanding this matter to an administrative law judge for determination through discovery of the Commission's internal records by these Respondents as to what actions were taken by the Commission during periods of "lapsed appropriation".

These Respondents further request the Commission to take such other and further action either at law or in equity to afford these Respondents the remedial rights to which they have shown themselves entitled.

Respectfully submitted,



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H. R. Gibson, Sr. and Belva Gibson

June 6, 1980

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX D

OPINION OF THE

FEDERAL TRADE COMMISSION

AMENDING THE

ORDER OF APRIL 30, 1980

96 FTC 126-133

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX D

OPINION OF THE

FEDERAL TRADE COMMISSION

AMENDING THE

ORDER OF APRIL 30, 1980

96 FTC 126-133

FEDERAL TRADE COMMISSION DECISION

Opinion

IN THE MATTER OF

HERBERT R. GIBSON, SR., ET AL

MODIFYING ORDER AND OPINION IN REGARD TO ALLEGED VIOLATION OF SEC.2 OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 9016, Final Order, April 30, 1980—Modifying Order, Aug. 8, 1980.

This order, granting in part, and denying in part, and denying in part respondents petitions for reconsideration, modifies the order issued on April 30, 1980, 45 FR 38352,95 F.T.C. 564, by inserting the word "while" before the word "acting," in paragraph 1, line 2 of Section 11; and by inserting a comma and the phrase "while acting as a buyer or acting for in behalf of or subject to the direct or indirect control of a buyer," after the word "respondent[s]," in paragraph 2, line 3 of Section 11.

ORDER GRANTING IN PART, AND DENYING IN PART, RESPONDENTS' PETITIONS FOR RECONSIDERATION

An opinion and final order in this matter having been issued on April 30, 1980; respondents having been served by mail with the said opinion and order on May 20, 1980 and May 21, 1980; respondents

having petitioned for reconsideration of said opinion and order on June 12, 1980; and the Commission, for the reasons stated in the accompanying opinion, having determined to grant in part, and deny in part, respondents' petitions for reconsideration;

It is ordered, That the final order to cease and desist be, and hereby is modified as follows:

In paragraph 1 of Section II of the Order, line 2, insert the word "while" in front of the word "acting"; and

In paragraph 2 of Section II of the Order, line 3, after the word "respondents[s]," insert a comma and the phrase "while acting as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer,".

OPINION OF THE COMMISSION

BY CLANTON, Commissioner:

Respondents have filed two petitions

for reconsideration of our recent opinion and order. Each petition asserts: (1) that the language and coverage of Section II of the Final Order should be changed; (2) that application of the opinion of the Court of Appeals in Grolier, Inc. v. FTC, 615 F. 2d 1215 (9th Cir.1980), requires disqualification of the administrative law judge ("ALJ"), Theodor P. von Brand, and hence dismissal or remand of the case; and (3) that certain actions taken by the Commission during periods of allegedly lapsed appropriations, including actions taken in the investigation and adjudication of this case, violated the Antideficiency Act, 31 U.S.C. 665(a) (1976), and hence require dismissal or remand of the case.

Section 3.55 of the Commission's Rules of Practice limits the scope of a petition for reconsideration to "new questions raised by the decision or final

order and upon which the petitioner had no opportunity to argue before the Commission." While certain of respondents' objections are appropriate for disposition by reconsideration, other contentions are not new or are untimely. We consider each of the objections raised seriatim.

A.

The petition filed by Herbert R. Gibson, Jr., Gerald P. Gibson and others objects to the inclusion of any respondent other than Herbert R. Gibson, Sr. in the provisions of Section II of the Final Order, which essentially enjoins respondents from violating Section 2(c) of the Clayton Act, 15 U.S.C. 13(c) (1976), as amended. This issue of order coverage is not new and these respondents had ample opportunity, which they exercised, to address this question during the course of trial and on appeal to the Commission. See, e.g., Answering Brief of Herbert R.

Gibson, Jr., filed May 29, 1979, at 9. The instant request is, therefore, inappropriate, cf. Interstate Builders, Inc., 72 F.T.C.1009, 1010 (1967); Lester S. Cotherman, 77 F.T.C.1621, 1622 (1970), and is denied.

The petition filed by Herbert R. Gibson, Sr. and Belva Gibson notes that the language of paragraphs 1 and 2 of Section II of the Final Order are at variance, in that only the former includes the phrase "as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer." The petition requests that the latter paragraph be altered to conform to the former. As the petitioners surmise, it was the Commission's intention that this phrase appear in both paragraphs, and an appropriate order correcting this typographical omission is annexed. To sum up, all Gibson respondents, except dissolved corporations, are bound by

Section II of the Final Order not to receive or induce payments which would violate Section 2(c) of the Clayton Act. This proscription applies irrespective of whether the respondent acts as a buyer, or on behalf of or subject to the control of a buyer.

B.

All respondents petition for reconsideration of the Commission's opinion and order in light of Grolier, Inc. v. FTC, 615 F.2d 1215 (9th Cir.1980). In that case, the Commission issued a complaint charging Grolier with violating Section 5 of the Federal Trade Commission Act. During the course of the hearings, Administrative Law Judge von Brand advised the parties that he had previously served as an attorney-advisor to former Commissioner Everette MacIntyre from 1963 to January 1971, during which time the

Commission was investigating Grolier and its subsidiaries. "upon learning of ALJ von Brand's advisory responsibility during the eight-year period, Grolier requested that the judge disqualify himself from further participation in the proceedings." 615 F.2d at 1217. Judge von Brand declined to recuse himself, and the Commission affirmed Judge von Brand's decision in an interlocutory order, 87 F.T.C. 179, 179-81 (1976), and again in its final order and opinion, 91 F.T.C. 315, 485-86 (1978). On appeal, the Ninth Circuit concluded that the Commission had incorrectly interpreted Section 5(c) of the ADministrative Procedure Act, 5 U.S.C. 554(d) (1976), in ruling on Grolier's disqualification challenge, and remanded the case to the Commission.

Although respondents in this case have not submitted a motion and affidavits as required by Rules of Practice Section

3.42(g)(2),[1] we understand the facts to be essentially as follows. Beginning in 1967, the Commission and its staff investigated respondents; the investigation culminated in a complaint issued in 1975. Judge von Brand presided over the proceedings from the issuance of the complaint, through trial (which began on December 19, 1977), and until his issuance of the initial decision in early 1979.

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[1] In relevant part, Rules of Practice Section 3.42(g), 16 C.F.R. 3.42(g), provides: "Whenever any party shall deem the ADministrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Secretary, a motion addressed to the Administrative Law Judge * * * to be supported by affidavits setting forth the alleged grounds for disqualification" The requirement of affidavits, grounded in 5 U.S.C. 556 (1976), is not an empty formality to be cast aside unilaterally by a party to a Commission proceeding. There are many reasons for such a requirement. An affidavit provides an exact, sworn recitation of facts, collected in one place, a disqualification motion must not be made by a party, nor taken by the Commission, lightly. "Such a charge,

Judge von Brand had previously served with the Commission as an attorney-advisor to Commissioner MacIntyre from 1963 until 1974. During Judge von Brand's tenure as attorney-advisor to Commissioner MacIntyre, participated in certain decisions connected with the investigation of respondents (e.g., the Commission voted on two investigational resolutions and ruled on a motion to quash three subpoenas).

In a pretrial conference on February 23, 1977 (about one year after issuance of

(footnote 1 cont'd.)
unfairly made, not only impugns without warrant the integrity of the government official entrusted with responsibility for deciding a given dispute, but it also unnecessarily tarnishes our beneficent traditions of legal due process." Marcus v. Director, Office of Wkrs' Comp. Prog. 548 F2d 1044, 1050 (D.C. Cir. 1976) (per curiam). Accordingly, the affidavit requirement serves not only to focus the facts underlying the charge, but to foster an atmosphere or solemnity commensurate with the gravity of the claim. Respondents' failure to submit affidavits is thus an independently sufficient basis to deny their petitions in this respect.

the Commission's interlocutory opinion affirming Judge von Brand's participation in Grolier, supra, and almost ten months before the start of trial in this case), Judge von Brand, apparently acting out of candor and an abundance of caution, disclosed to the parties on the record[2] the fact of his prior service to Commissioner MacIntyre, and recited his "understanding that none of the respondents * * * would raise an objection to [his] continuing in the case on that ground." (Tr. at 242.) All counsel, including counsel for the instant petitioners, responded unequivocally that there would be no such objection. (Id. at 242-43.) The case proceeded through trial, and, consistent with their

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[2] The transcript reveals that Judge von Brand disclosed his prior service off the record as well. (Tr. at 242).

statements, respondents did not object to Judge von Brand's participation. Neither did respondents object in their appeal papers before the Commission, or at oral argument in July, 1979.

The Ninth Circuit's opinion in Grolier was issued on January 24, 1980; responddents did not attempt to present a Grolier-type challenge to Judge von Brand in this case before the Commission's decision and order issued on April 30, 1980.

Respondents now urge, for the first time, that the Ninth Circuit's decision in Grolier requires the Commission, under the Constitution, the Administrative Procedure Act, and the Commission's Rules of Practice[3] either (1) to disqualify Judge

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[3] The Court of Appeals' decision in Grolier involved only an interpretation of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 554(d) (1976) and did not purport to interpret the Constitution or the Commission's Rules of

(footnote 3 cont'd.)
Practice; accordingly, it offers no basis for relief on those grounds.

Respondents' very general assertion of their right to trial by a "fair and impartial judiciary" is based upon the due process clause of the Fifth Amendment. While we are and must be sensitive to such considerations, neither will we substitute our judgment for that of the federal judiciary or the Congress Assuming arguendo that Judge von Brand possessed some familiarity with the facts of the case gained through his service to Commissioner MacIntyre (notwithstanding that Judge von Brand's tenure as an attorney-advisor ended four years before issuance of the complaint), his presiding over the trial would not constitute a due process violation. "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not * * * disqualify a decisionmaker." Hortonville Joint School District No. 1 v. Horton Education Ass'n. 426 U.S. 482, 493 (1976); accord, Withrow v. Larkin, 421 U.S. 35, 47-59 (1975) (contention that combination of investigative and adjudicative functions violates due process carries difficult burden of persuasion); Pangburn v. CAB, 311 F.2d 349, 358 Cir. 1962) participate in investigative and adjudicative decisions in the same case. To hold that Judge von Brand's participation violated the Constitution would thus be to declare that the Administrative Procedure Act is constitutionally deficient. Cf. Withrow v. Larkin, supra, 421 U.S. at 56 (APA not unconstitutional).

As to the respondents' reference to the Commission's Rules, they cite none, and we are aware of none, that might be relevant.

von Brand and (a) dismiss the case or (b) vacate its decision and remand for a new trial;[4] or (2) to grant discovery in the form, inter alia, of a deposition from Judge von Brand and access to Commission records. In our view, even apart from estoppel due to respondents' waiver, there is an important element—timeliness—present in Grolier, but lacking here, which makes the cases altogether different; indeed, respondents' lack of timeliness bars them from any relief.

"A basic requirement for any disqualification motion is, of course, that it be presented either at the outset of the proceeding or immediately after

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[4] Even if fully applicable, Grolier at most would require reconsideration by the Commission. The Ninth Circuit's opinion, by its terms, requires neither retrial nor dismissal. 615 F.2d at 1222.

ascertainment of the circumstances that prompt its filing." Kroger Co., Dkt. 9102 (Order filed June 5, 1980, at 2) (quoting 5 U.S.C. 556(b)). See Rules of Practice Section 3.42(g)(2) (Motion to be filed "[w]henever" a party deems ALJ disqualified; also provides for expedited Commission determination). In this respect, the Commission's requirements are consistent with the "general rule governing disqualification, normally applicable to the federal judiciary and the administrative agencies alike," that disqualification claims must be raised "as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist." Marcus v. Director, Office of Wkrs.' Comp. Prog., 548 F.2d 1044, 1051 (D.C. Cir. 1976) (per curiam) (footnotes omitted); accord, Capitol Transp., Inc. v. United States, 612 F.2d 1312, 1325 (1st Cir. 1979); Duffield

v. Charleston Area Medical Center, Inc., 503 F.2d 512, 515 16 (4th Cir. 1974) (collecting cases); Safeway Stores, Inc. v. FTC, 366 F.2d 795, 802-03 (9th Cir. 1966), cert. denied, 386 U.S. 932 (1967); R. A. Holman & Co. v. SEC, 366 F.2d 446, 454-55 (2d Cir. 1966), cert. denied, 389 U.S. 991 (1967); Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589, 592 (7th Cir.), aff'd, 333 U.S. 683 (1945). See also United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 38 (1952). The rule of timeliness requires that a party act as soon as possible after the facts have become known. Satterfield v. Edenton-Chowan Bd. of Ed., 530 F.2d 567, 574 (4th Cir. 1975) (citing cases); and inaction may waive a separation-of-functions disqualification claim, International Paper Co. v. FPC, 438 F.2d 1349, 1357 (2d Cir.), cert. denied, 404 U.S.827 (1971); Democrat Printing Co. v. FPC, 202 F.2d 298

(D.C. Cir. 1952); see Satterfield v. Edenton-Chowan Bd. of Ed., supra; Duffield v. Charleston Area Medical Center, supra. Under Section 3.42(g) (2) of the Commission's Rules of Practice, a party "may" choose to present a disqualification challenge; it need not do so. However, if it chooses to do so, it must do so promptly after the facts supporting the charge are known to it. A disqualification challenge to an ALJ's participation subsequent to the Commission's final decision based on circumstances known to a party before the Commission's final decision is not timely. Capitol Transp., Inc. v. United States, supra; International Paper Co. v. FPC, supra; Safeway Stores, Inc. v. FTC, supra.

The reasons supporting such a rule are manifold. A contrary holding, inter alia, would allow a party the possibility of invalidating the proceedings retroactively, unilaterally, and at will, if it

feared or received an unfavorable ruling, or merely wished to delay the proceedings; might cause substantial delays, and, if retrial were required, significant unnecessary duplication of effort and expenditure of resources; and might make determinations of disqualification more difficult and less certain because of the passage of time. See generally Marcus v. Director, Office of Wkrs.' Comp. Prog., supra, 548 F.2d at 1050-51; Duffield v. Charleston Areas Medical Center, supra.

Applying these principles to this case, it is clear that the facts are substantially different from those in Grolier. In Grolier, the respondents in the Commission's adjudicative proceedings raised the issue promptly after Judge von Brand's record announcement of his prior service as attorney-advisor to Commissioner MacIntyre; both the ALJ and the Commission considered the claims

promptly, during trial and before the closing of the record. Despite the ALJ's and the Commission's interlocutory rulings, the Grolier repondents pressed their claim—as was their right—on appeal of the initial decision to the Commission and on appeal of the Commission's decision to the Ninth Circuit. Moreover, the Grolier respondents never agreed not to present their disqualification claims.

In this case, Judge von Brand formally notified the parties on February 23, 1977, of his prior service to Commissioner MacIntyre. It is thus clear that, in the event that respondents did not know of Judge von Brand's service to Commissioner MacIntyre as of the time of Judge von Brand's appointment as an ALJ or as of the time the Commission issued its interlocutory order in Grolier in 1976, they did know of it at least nine months before trial began. Respondents agreed to

put forward no objection, and, indeed, honored that agreement throughout the administrative trial and appeal of this case. Consistent with the above-cited authorities, which require timeliness in a disqualification application, respondents may not now for the first time raise this issue.

Of course, respondents do not contend that their failure to object—indeed, their agreement not to object—was predicated upon the Commission's 1976 Grolier ruling. Rather, they only suggest, in an indirect manner, that their failure to raise the issue at oral argument in July, 1979 was based on their reliance on Grolier. Yet, after the Ninth Circuit's decision in Grolier, they waited months before presenting any objection. During this time, the Commission issued its final order and opinion. Accordingly, even assuming that an objection might have been

timely after the Ninth Circuit's decision in Grolier, it is untimely now.

Finally, we note that respondents have not demonstrated or even asserted that they were prejudiced by any bias or reliance on extra-record materials by Judge von Brand; our review of the record convinces us that Judge von Brand was was impartial in every respect, that his decision was thoroughly researched, and that his meticulous findings and conclusions were firmly and exclusively based on the record evidence. Of course, to the extent respondents challenged Judge von Brand's findings, conclusions, and proposed order, we undertook an exhaustive, independent review. In that review, we did not find that issues of demeanor or discretion were especially important in the determination of the case; thus, even if it were to be determined that Judge von Brand was disqualified, our

decision of April 30, 1980, would not be void, as respondents have neither demonstrated nor suggested actual prejudice from his presiding, and we perceive none.[5] See Attorney General's Manual on the Administrative Procedure Act at 73-74 (1974).

For the foregoing reasons, respondents' motion for reconsideration based upon Judge von Brand's participation is denied.

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[5] Ironically enough, at another point in this proceeding, Judge von Brand suggested to the parties that it might be necessary or advisable to have another ALJ assigned to this case because of his heavy case load. When asked for his reaction to this possibility, counsel for Herbert R. Gibson, Sr., and Herbert R. Gibson, Jr., told Judge von Brand "We'd like to keep you." Tr. at 276.

C.

Finally, respondents assert that the Commission took various actions in this adjudication and in the investigation preceding it at times when the Commission was without authority and without appropriated funds, and, consequently, that the Commission violated the Antideficiency Act. Respondents assert that the Commission should either declare the entire adjudicatory proceeding void or remand the proceeding to the Administrative Law Judge to allow discovery by respondents as to the Commission acts performed during periods of lapsed appropriations.

The Antideficiency Act, 31 U.S.C. 655(a) (1976), prohibits any government officer or employee, unless expressly authorized by statute, from incurring any obligation on the part of the United States

to pay money in advance of appropriations for that purpose. Although the Commission's funding did lapse during several of the periods listed by respondents in their petitions for reconsideration,[6] the legal validity of the Commission's actions is unaffected by the temporary lapse of appropriations for the following reasons.

First, actions by Commission employees completed prior to the expiration of appropriations do not create an unfunded obligation and, therefore, do not result in a violation of the Antideficiency Act.

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[6] Contrary to respondents' assertion, the Commission's funding did not lapse during the periods July 1-September 30, 1976, and March 12-March 15, 1980. See Public Laws 94-121 and 96-123, respectively. The former period, in particular, related not to a lapse in funding, but to a change in the United States Government's fiscal year.

Second, even if a Commission action on the Gibson matter was not completed prior to the expiration of appropriations and, therefore, were to be interpreted as incurring a Commission obligation, such action was ratified by Congress when the Commission's funding was made retroactive either explicitly or implicitly to the start of the period of lapsed appropriations.[7] As noted in the recent opinion letter of the Attorney General, on which respondents rely, such a ratification has the effect of providing legal authority for agency actions, even where there was none before. Letter from Attorney General Benjamin Civiletti to President Jimmy Carter (April 25, 1980). Thus, even assuming that respondents have

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[7] See Public Laws 93-118, 93-124, 93-448, 93-563, 95-431, 96-86, and 96-219.

standing to challenge the Commission actions.[8] none of the Commissions's activities has been invalidated by the Antideficiency Act.

In this respect, too, therefore, the petitions for reconsideration are denied.

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[8] Neither the Antideficiency Act itself nor its legislative history or scheme suggests that private persons are to be afforded a remedy under the Act. The language of the statute specifies that a government officer or employee who violates Sections 665(a) or (b) of the Act will be subjected to administrative and/or criminal penalties. 31 U.S.C. 665(i)(1). Moreover, the legislative history clearly indicates that the intended beneficiary of the regulatory scheme was Congress; the statutory scheme was designed to require the careful apportionment by Federal agencies of the funds distributed by Congress and thereby ensure the efficient administration of the government's business.

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX E

ALJ'S OPINION AND

ORDER OF

FEBRUARY 26, 1979

95 FTC 553-721

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX E

ALJ'S OPINION AND

ORDER OF

FEBRUARY 26, 1979

95 FTC 553-721

ALJ'S OPINION AND ORDER OF

FEBRUARY 26, 1979

95 FTC 553-721

[ID, pp. 164-165]

420. On a number of occasions, H. R. Gibson, Sr. visited the office of Jim Miller in connection with Ray-O-Vac (Miller 3132). On such visits, Gibson, Sr. negotiated deals with Miller and Barshell to pay Gibson or the Gibson Trade Show promotional allowances based on sales and the activities Gibson performed to sell Ray-O-Vac products to the Gibson stores (Miller 3132). 96/

96/

Q. Now, when you are referring to Gibson, who are you speaking of?

A. Well, that would be Mr. Gibson, Sr., or Gibson Trade Show. Because it was, you know, kind of interwoven there. We really never knew who we were dealing with (Miller 3132).

The basis of such payments to Gibson, Sr. by Barshell, pertaining to Ray-O-Vac (Miller 3132-33), varied:

> Well, it would just depend. Mr. Gibson, was never consistent with that. It would depend on what he felt like he did for you.
>
> If he had written a general order, where he had insisted that the stores, or suggested that the stores buy a certain quantity of merchandise, and if this order amounted to a hundred thousand dollars, he would expect more from the agency than he would if you had solicited the business yourself from those stores (Miller 3133).

421. Ray-O-Vac automatically sent commission statements to Barshell (Miller 3134). The commission statements recorded all of Ray-O-Vac's shipments to the individual Gibson stores, showing the dollar volume figures, such statements showed the commission which Barshell had earned through those sales (Miller 3134). Gibson, Sr. checked Barshell's commission statements received from Ray-O-Vac in

connection with his visits to Miller concerning Barshell's activities for that supplier (Miller 3132-33).

422. After Gibson, Sr. had checked Ray-O-Vac's commission statements, Barshell made payments to Gibson, Sr., termed promotional allowances, on the basis of Ray-O-Vac sales recorded in such commission statements (Miller 3132-35). CX 192, a Barshell check in the amount of $13,173.43, dated September 23, 1972, is one such payment (Miller 3134-35). 97/

97/ The check is made out to H. R. Gibson, and endorsed "H. R. Gibson dba Gibson Products Company" (CX 192). The witness testified:

> JUDGE von BRAND: All right. Where did the commission statement originate?
>
> THE WITNESS: They would originate with the Ray-O-Vac Company. They would be sent to us automatically.
>
> JUDGE von BRAND: Proceed:
>
> (A paper was marked for identification as Commission's Exhibit No. 192.)

423. CX 192 is a check transmitting brokerage fees by Barshell, received from Ray-O-Vac, to H. R. Gibson, Sr. (Miller 3132-35, 3140, 3147-48) 98/ at a time when Gibson, Sr. was owner and operator of various retail stores or, in short, a buyer from Ray-O-Vac (Findings 5, 6).

(footnote 97 cont'd)
By Mr. Brookshire:

Q. Mr. Miller, I hand you what has been marked as CX-192 for identification. And I ask if you can identify that document, please, sir?

A. Yes. This is a check drawn on North Central State Bank on Barshell, Incorporated, dated 9-23-1972, in the amount of $13,173.43.

Q. What was the purpose of that check?

A. This would have been promotional allowance given to Gibson for whatever group of commission statements or activity covered for a period of time with Gibson (Tr.3134-35).

98/

Q. Mr. Miller, referring to a document which has been identified, or been

(footnote 98 cont'd.) admitted into evidence as CX-192, were there ever any other checks issued under the same or similar circumstances by Barshell?

A. Yes.

Q. To who?

A. To Gibson. Mr. Gibson, Sr.

Q. Do you recall whether or not such checks were issued in 1971?

A. I would have to assume that they were. Offhand, I don't recall. I would have to assume, yes, depending upon what time of the year that Barshell took over the representation of Ray-O-Vac.

Q. How often were these checks payable?

A. Well, most of the time, it would depend upon when Mr. Gibson came by and sat down to negotiate with us. And that could be anywhere from, usually every other month, to three or four months (Tr. 3140).

[ID, p. 199]

Respondents urge that the payments in question fall within the "except for services rendered" proviso of Section 2(c) and that a showing of price discrimination is prerequisite to finding a violation of this section (RPF Sr. pp. 139, 142). These contentions require analysis in light of FTC v. Henry Broch & Co., 363 U.S. 166 (1966), and succeeding cases. Respondents' reliance on the "except for services rendered" proviso is misplaced. Gibson, Sr. received such payment in 1972 from Barshell as a buyer, before he had divested himself of his retail assets. The services he rendered in connection with the trade show were, in effect, rendered for himself and, thus, not cognizable under the exception. The fact that the supplier may also have benefited is immaterial. Southgate, 150 F.2d at 610.

[ID, pp. 201-202]

In summary, developments under Section 2(c) since Broch do not warrant an exception to the rule of Southgate in this proceeding.

Even if the "except for services rendered" proviso were available under these circumstances, the burden would still be on respondents to establish it. The provision would become a sham unless those seeking to take advantage of it established the value in concrete terms of the services rendered in relation to the commission payments received. In addition to a claim that brokerage was paid for services rendered, there must be a showing that the distribution costs saved justified the amount of the allowance. No such showing has been made here and respondents' reliance on the provision is rejected. 124/

124/ Implicit in the Broch dicta concern-

(footnote 124 cont'd.)
ing the "except for services rendered" proviso is a requirement that the party asserting the defense demonstrate that the services in question gave rise to sufficient cost savings to warrant the reduction in brokerage. In this connection, the Court stated in pertinent part:

> We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances. One thing is clear -- the absence of such evidence and the absence of a claim that the rendition of services or savings in distribution costs justified the allowance does not support the view that § 2(c) has not been violated (emphasis added).

363 U.S. at 173-74.

The Supreme Court's Broch decision does not stand for the proposition that price discrimination is prerequisite to a finding of violation in each Section 2(c) case. The prior Supreme Court decision in FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959), distinguishing Sections 2(c), (d) and (e) from the pricing provisions of the Act, indicates that Broch imposed no universal requirement that price discrimination must be proven in each 2(c) case. As the Court stated, while holding Section 2(b) inapplicable in a 2(e) proceeding:

> Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations. * * * In terms, the proscriptions of these three subsections are absolute. Unlike § 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition (emphasis added).

360 U.S. at 65.

Neither the text of Section 2(c) nor the statutory context of that section requires that it be limited to instances of price discrimination. Rangen Inc., 351 F.2d at 856. In light of Broch, the element of price discrimination may be helpful under certain circumstances in determining whether a payment was made in "lieu of brokerage." However, the holding on this point does not apply to cases, such as the instant proceeding, involving the outright payments of unearned brokerage by a seller's broker to a buyer. As the Ninth Circuit held in Rangen:

> There has been some speculation that the Broch case may have superimposed a requirement of price discrimination on section 2(c). Rowe, Price Discrimination Under the Robinson-Patman Act 344-45 (962); Federal Trade Comm'n v. Henry Broch & Co., 363 U.S. 166, 189, 80 S. Ct. 1158 (dissenting opinion). However, discrimination was used in Broch to determine if the price arrangement was an "in lieu" of brokerage

> transaction;and, although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage.

351 F.2d at 858.

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX F

5TH CIRCUIT JUDGMENT

AUGUST 13, 1982

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX F

5TH CIRCUIT JUDGMENT

AUGUST 13, 1982

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-1743

FTC Docket No. 9016

HERBERT R. GIBSON, JR., ET AL.,
Petitioners
versus
FEDERAL TRADE COMMISSION,
Respondent.

No. 80-1746

H. R. GIBSON, SR., ET AL.,
Petitioners,
versus
FEDERAL TRADE COMMISSION,
Respondent.

Petitions for Review of a Final Order of the Federal Trade Commission

---

Before BROWN, COLEMAN and RUBIN, Circuit Judges.

J U D G M E N T

These causes came on to be heard on the petitions of Herbert R. Gibson, Jr., et al. and H. R. Gibson, Sr., et al. for review of a final order of the

Federal Trade Commission of the United States, and were argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the final order of the Federal Trade Commission in these causes be and the same is hereby, affirmed and enforced;

IT IS FURTHER ORDERED that petitioners pay to respondent the costs on appeal, to be taxed by the Clerk of this Court.

AUGUST 13, 1982

ISSUED AS MANDATE: SEP 23 1982

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX G

5TH CIRCUIT ORDERS

DENYING REHEARING AND

REHEARING EN BANC

SEPTEMBER 13, 1982

688 F2d 840

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX G

5TH CIRCUIT ORDERS

DENYING REHEARING AND

REHEARING EN BANC

SEPTEMBER 13, 1982

688 F2d 840

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 80-1746

H. R. GIBSON, SR., ET AL.,
Petitioners,

versus

FEDERAL TRADE COMMISSION,
Respondent.

- - - - -

Petition for Review of an Order of the Federal Trade Commission.

- - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 13, 5 Cir.,1982,___F.2d__)

(SEPTEMBER 13, 1982)

Before BROWN, COLEMAN and RUBIN, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules

of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOHN R. BROWN
UNITED STATES CIRCUIT JUDGE

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF MANDATE

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX H

TESTIMONY

OF

JAMES S. MILLER

FEBRUARY 16, 1978

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX H

TESTIMONY

OF

JAMES S. MILLER

FEBRUARY 16, 1978

TESTIMONY OF JAMES S. MILLER BEFORE ALJ THEODORE P. VON BRAND—FEB. 16, 1978

[TR-3132]

Q. Were there any visits made by Mr. Gibson concerning Ray-O-Vac?

A. Yes.

Q. What were those visits concerning?

A. Most of the time, it would be to negotiate a deal with me--I mean, with Barshell--to pay Gibson for activities concerning the Gibson stores.

Q. When you say, "to pay Gibson for activities concerning the Gibson stores," what do you mean?

A. Well, we were required by Gibson to pay him promotional allowances, based on sales and the amount of activity that he would perform, in order to sell Gibson stores.

Q. Now, when you are referring to Gibson, who are you speaking of?

A. Well, that would be Mr. Gibson, Sr., or Gibson Trade Show. Because it was, you know, kind of interwoven there. We really never knew who we were dealing with.

Q. You indicated that you, on occasions, paid Mr. Gibson in connection with your activities with Ray-O-Vac.

[TR-3133]

A. Correct.

Q. What were these payments based on?

A. Well, it would just depend. Mr. Gibson was never consistent with that. It would depend on what he felt like he did for you.

If he had written a general order, where he had insisted that the stores, or suggested that the stores buy a certain quantity of merchandise, and if this order amounted to a hundred thousand dollars, he would expect more from the agency than he

would if you had solicited the business yourself from those stores.

Q. Was there any method by which he made a determination as to how much he might feel was right?

A. Well, that ranted all the way from zero to the top.

Q. Did you keep any records that might indicate any amounts that you had sold?

A. Well, we always had those records available because we had, of course, a monthly commission statement from the factory. So, we always had those available.

Q. Were they ever checked by Mr. Gibson?

A. Yes, they were.

Q. After Mr. Gibson had checked these commission statements that you have indicated, were there any payments made?

A. Yes.

Q. How were the payments made?

[TR-3134]

A. By check.

JUDGE von BRAND: All right.

Would you just tell me, what is a commission statement?

THE WITNESS: Yes. A commission statement is usually an IBM computation, recording all of the factories' shipments to the individual Gibson stores, whereby it shows the dollar volume that was shipped to those stores. And then, along the size that dollar volume, it would reflect the commission which we had earned through those sales.

JUDGE von BRAND: All right.

Where did the commission statement originate?

THE WITNESS: They would originate with the Ray-O-Vac Company. They would be sent to us automatically.

JUDGE von BRAND: Proceed.

(A paper was marked for identification as Commission's Exhibit No. 192.)

By Mr. Brookshire:

Q. Mr. Miller, I hand you what has been marked as CX-192 for identification. And I ask if you can identify that document, please, sir?

A. Yes. This is a check drawn on North Central State Bank on Barshell, Incorporated, dated 9-23-1972, in the amount of $13,173.43.

Q. What was the purpose of that check?

[TR-3135]

A. This would have been promotional allowance given to Gibson for whatever group of commission statements or activity covered for a period of time with Gibson.

MR. BROOKSHIRE: Your Honor, I request CX Exhibit 192 for identification be admitted into evidence.

MR. STEELE: No objection.

JUDGE von BRAND: CX-192 is received.

(The document previously marked as Commission Exhibit 192 was received in evidence.)